contract of service between such employee and his employer ..."

In our view it is clear that the dispute in the present appeal is "a dispute between an employee and his employer" and that it is a dispute "to pay wages". We also hold that it is a dispute which "arose out of any term in the contract of service between such employee and his employer" because wages as a matter of law are terms which are dealt with in the contract of service. Although fixed by virtue of W.C.A. and the order, SMR has to be read into every contract of service of an employee to whom W.C.A. and the Order apply. This is so provided for by section 13(1) which enacts that –

"If a contract between a worker to whom a wages regulation order applies and his employer provides for the payment of less remuneration than the statutory minimum remuneration, it shall have effect as if for that less remuneration there were substituted the statutory minimum remuneration (SMR) ..."

The next question is whether the W.C.A. has created so complete a machinery to enforce the SMR, that the Director of Labour is precluded from exercising jurisdiction under section 69(1) of E.A. except by way of criminal prosecution and civil proceedings only. Looking at the legislative scheme, we are of the view that whatever machinery provided by the W.C.A. is not intended to be either exclusive, or even exhaustive.

E.A., whose long title is "An act relating to employment" regulates relationship between an employer and certain categories of employees enumerated in the First Schedule to E.A. The respondents are no doubt falling within one of these categories. Amongst the matters regulated by E.A. are contract of service and payment of wages. W.C.A., however, also deals with wages and provides a machinery as to how to fix the minimum amount of wages and guarantees this amount to an employee. Thus W.C.A. is a complementary legislation to E.A. It cannot be regarded as a separate scheme of legislation but of necessity as an integral part of E.A., though the terms used in the two Acts are not the same, but interchangeably carrying the same meaning and concept. The difference, in our view, is nothing more than due to the difference of draftsmanship. No one should doubt that these words (workers and employees, wages and remuneration) carry the same meaning.

For the reasons given above, we hold that the Director of Labour has jurisdiction to act under section 69(1) to deal with a complaint regarding SMR under W.C.A. and that the objection that he is not a legally qualified person is completely irrelevant because his decision is in any case subject to a review by the High Court and eventually by the Supreme Court as has happened in the present appeal (vide section 76 of E.A.)

Finally, we dismiss the appeal with costs and order that the deposit should be paid to the respondents on account of taxed costs.

Appeal dismissed.

Solicitors: *Shook Lin & Bok.*

NAM JOO HONG CHAN FEEDMILLS SDN. BHD. v. SOON HUP POULTRY FARM

[S.C. (Salleh Abas L.P., Wan Suleiman & Syed Agil Barakbah S.C. JJ.) January 28 & March 30, 1985]

[Kuala Lumpur – Federal Court Civil Appeal No. 237 of 1984]

Contract – Debtor owing several distinct debts – Payment – Appropriation by debtor or creditor – Current account – Judgment against debtor – Enforcement – Contracts Act 1950, ss. 60, 61 & 62.

Practice and Procedure – Judgment – Enforcement of – Writ of seizure and sale – Payments by debtor – Appropriation

In this case the appellants had supplied chicken feed to the respondent's poultry farm. The chicken feed was supplied on 30 days credit and the appellant kept a running and current account in respect of the supplies. The appellants obtained a judgment against the respondents for $139,804.55. However despite this judgment the parties carried on their business relationship. Considering that the judgment remained unsatisfied, the appellants applied for and obtained a writ of seizure and sale to enforce judgment. The respondents applied to set aside the writ on the ground that they had fully satisfied the judgment by paying on various occasions a total sum of $157,716.87. There was no dispute that the respondents in addition to the judgment debt owed the appellants other debts, in respect of their dishonoured cheques and also new debts arising out of supplies of feeds delivered after the date of the judgment. The respondents made no appropriation when they made the payments totalling $157,716.87 but the appellants claimed that the payments were to be applied first to satisfy the amount of the dishonoured cheques and secondly to the amount of new debts and that only if there was a remainder would the balance be applied to the judgment debt. They claimed to have set out this method of appro-

priation in a letter to the respondents but the respondents denied receipt of the letter. The learned Judge of the High Court set aside the appellant's writ of seizure and sale. The appellants appealed.

Held: (1) the appellants having asserted that they had made the appropriation it is for them to prove it but since the existence and contents of the letter relied on by the appellants were denied by the respondents the court was not in a position to hold that there was appropriation by the appellants;

(2) in any event, the appellants kept their account continuously in one current account and therefore they have no right to make the appropriation;

(3) the writ of seizure and sale against the respondents is misconceived and was therefore properly and rightly set aside by the learned Judge.

SUPREME COURT.

P. Cumaraswamy (*Wong Kuo Shing* with him) for the appellants.

M.S. Murthi for the respondents.

Cur. Adv. Vult.

Salleh Abas L.P. (delivering the Judgment of the Court): This is an appeal from the decision of Abdul Razak J. setting aside the appellants' writ of seizure and sale seeking to attach the respondents' poultry farm in order to enforce a judgment which they obtained against the respondents.

The appellants are suppliers of chicken feed to the respondents' poultry farm. Their business relationship began in 1981. The chicken feed was supplied on 30 days credit term from the date of invoice and the credit limit granted to the respondent was $60,000.00. The appellants kept a running account in respect of these supplies.

On April 10, 1982 the appellants obtained a judgment in default of appearance against the respondents for $139,804.55¢ inclusive of costs. However, despite this judgment the parties carried on their business relationship; the appellants continuing to supply the chicken feed on the same 30 days credit terms and, indeed, their credit limit was increased to $200,000.00. Considering that the judgment remained unsatisfied on April 23, 1984, the appellants applied for and obtained a writ of seizure and sale to enforce the judgment. The respondents on the other hand contending that they had fully satisfied the judgment by paying on various occasions between April 20, 1982 and August 24, 1983 a total sum of $157,716.87¢ applied to the court for the setting aside of this writ.

Abdul Razak J. who heard the respondents' application gave judgment in favour of the respondents and hence this appeal.

The rule as to the payment of debt by a debtor who owes several distinct debts is governed by section 60, 61 and 62 of the Contracts Act. (See also 9 *Halsburys* Laws of England, 4th edition, paras 505 and 506). Under these sections the debtor has the right when he makes a payment to appropriate it to any of the debts, and the creditor is bound, if he accepts the payment, to apply it in the manner directed by the debtor. If, however, the debtor does not make any appropriation at the time when he makes the payment, the right of appropriation devolves on the creditor, who is entitled to apply the payment to any lawful debts actually due whether statute-barred or not. The appropriation can be made in express terms but it must be communicated. However, an intention to appropriate it can also be inferred from the nature of the transaction or the circumstances of the case. Where neither the debtor nor the creditor makes any appropriations the payment shall be applied in discharge of the debts in order of time, whether they are or are not statute-barred. If the debts are of equal standing, the payment should be applied in discharge of each debt proportionally.

There is no dispute that the respondents in addition to the judgment debt owed the appellants other debts. They owed a total sum of $70,800.00 in respect of their dishonoured cheques and also new debts arising out of the supplies of feeds delivered after the date of the judgment. There is also no dispute that the respondents made no appropriation when they made the payments totalling $157,716.87¢ which they claimed to have discharged the judgment debt. The appellants, however, contended that they had made the appropriation to the effect that the payments were to be applied first to satisfy the amount of dishonoured cheques, then secondly to the amount of new debts, which arose from the continuing supplies delivered after the date of the judgment and that only if there was a remainder would the payment be applied to the judgment debt. The basis of this submission is a letter which they wrote to the respondents dated March 31, 1982 — exhibit TS 2(b), which is as follows:

"NAM JOO HONG CHAN FEEDMILLS SDN. BHD.
Head Office: 56 Jalan Roger, Kuala Lumpur.

March 31, 1982.

Mr. Lee Soon Chong & Mr. Soh Hue Tan,
t/a Soon Hup Poultry Farm,
Lot 6093, 5¼ Miles Jalan Meru,
Klang, Selangor.

Dear Sirs,

Re: Your Outstanding Account with Us

We refer you to our discussion on March 30 in which you have agreed that:

After the writ of summons was served on you for whatever orders made thereafter, you will have to pay us accordingly on each delivery; should there be any excess amount paid it will be utilized to clear off the following bounced cheques FIRST and also the amount claimed in the writ of summons:

Cheque date	*Cheque Nos.*	*Amount Bounced*
19/3/82	261685	$ 8,000.00
20/3/82	261686	6,500.00
27/3/82	261688	$22,500.00

Also, there are still a total amount of $43,100 post-dated cheques with us which we hope they would be cleared when we bank-in.

In addition, there is also an outstanding amount of $5,200 due by you as at 31/12/81 which was owed from the previous returned cheques and as it is still outstanding we hope it would be settled without delay.

Your attention to the above is appreciated.

Thank you.

Yours faithfully,
NAM JOO HONG CHAN FEEDMILLS SDN. BHD.
Sg. Manager."

The respondents denied having received this letter, and claimed that they were unaware of its existence until it was produced as an exhibit to Mr. Tai Sung @ Tai Voo Sung's affidavit sworn on behalf of the appellants on July 11, 1984. As regards this letter Mr. Tai said that on March 30, 1982 before the default judgment was entered the parties had a meeting and that the decision of the meeting was conveyed to the respondents in two letters of the same date, namely TS2(a) and TS2 (b). The letter TS2(a) gave the respondents 30 days credit term and raised their credit limit from $60,000.00 to $200,000.00, whilst TS2(b) informed the respondents of the appellants' proposal to appropriate payment received from the respondents in a manner stated therein.

As the respondents denied having received it and any knowledge of it, the case should therefore stand and fall on the admissibility and probative value of this letter.

At the hearing of the respondents' application to set aside the writ of seizure and sale, which was held on July 17, 1984, the appellants sought an adjournment in order to enable them to file an affidavit showing that the letter TS2(b) was in fact delivered to the respondents. The learned judge refused the adjournment. However, after the conclusion of oral arguments by both sides, the learned judge adjourned the case for counsel to submit their respective written submissions and finally for judgment. It was together with their written submission which was filed three days later (July 20, 1984) that an affidavit of one Dr. Lee Hua Teik, the appellants' factory manager, sworn on the same day was filed in court and served on the respondents. In this affidavit Dr. Lee stated he personally delivered the letter TS2(b) to the respondents. In his written judgment the learned judge commented against the improper filing of this affidavit which, he said, was in disregard of the rules of court and unfair to the respondents as it gave no opportunity to them to rebut the contents thereof. The respondents objected to the inclusion of this affidavit in the records of appeal and despite the objection the affidavit is included. At the outset of the appeal the respondent moved the court to exclude the affidavit from the records of appeal.

Much of the time of the court was wasted on hearing this motion. Finally, we rejected the motion because we do not think that the affidavit should materially affect the outcome of the appeal.

The dispute between the parties really boils down to this: whether or not the appellants made the appropriation regarding payments they received from the respondents. The appellants said they made it and relied upon exhibit TS2(b). The respondents denied this assertion and further denied that they were even aware of the document. There is thus a conflict of evidence on this crucial issue, which is the very issue which would decide the dispute between the parties. The inclusion of the affidavit of Dr. Lee hardly adds any weight to the appellants' evidence. This conflict should not be resolved by treating one affidavit as being more worthy of belief than another but by a cross-examination of the deponents of the affidavits. The appellants having asserted that they had made the appropriation it is for them to prove it, and therefore to prove the letter TS2(b) and its contents. Since the existence and contents of the letter were denied by the respondents the court is not in a position to hold that there was an appropriation made by the appellants.

We also like to say that we agree with the reasons given by the learned judge as to why he declined to give any weight to the letter. One of these reasons is that despite the fact that TS2(b) purports to be an agreement between the parties, there was no signature of the respondents appearing on it indicating that they have accepted the term therein. On the other hand, in the two other documents, TS1 and TS2(a) which deal with 30 days credit and credit limit the respondents' signatures were insisted upon. The absence of the respondents' signature on the letter TS2(b), therefore, requires some explanation.

The other circumstance which rules out the existence of right to make appropriation is that the appellants keep their account continuously. No new account was opened as regards new debts. They are all in one current account. For this purpose we only need to refer to para 507 of 9 HLE, 4th edition, which is as follows:

"507. *Account current. Prima facie,* the right of appropriation by the creditor does not arise in the case of an account current, that is to say, where there is one entire account into which all receipts and payments are carried in order of date, so that all sums paid in form one blended fund. In such a case the presumption is that the first item on the debit side of the account is intended to be discharged or reduced by the first item on the credit side, and that the various items are appropriated in the order in which the receipts and payments are set against each other in the account."

Thus, whatever the state of indebtedness of the respondents to the appellants the latter have no right to make appropriation.

For the reasons given, we are of the view that the writ of seizure and sale against the respondents is misconceived and was therefore properly and rightly set aside by the learned judge.

The appeal is therefore dismissed with costs. And the deposit is to be paid to the respondents on account of taxed costs.

Appeal dismissed.

Solicitors: *Wong Kuo Shing & Co.; Syarikat Davidason.*

AVEL CONSULTANTS SDN. BHD. & ANOR. v. MOHAMED ZAIN YUSOF & ORS.

[S.C. (Salleh Abas L.P., Wan Suleiman & Syed Agil Barakbah S.C. JJ.) January 10 & April 1, 1985]

[Kuala Lumpur – Federal Court – Civil Appeal No. 135 of 1984]

Company – Director in fiduciary relationship with company – Breach of fiduciary duty.

Practice and procedure – Application for summary judgment – Breach of fiduciary duty by directors of company – R.H.C. 1980, O. 14.

In this case the first and second respondents were directors of the first appellant company while the third respondent was director of the second appellant company. The three respondents formed a firm with the object of carrying on business as consultant engineers, the same as that of the appellant companies. The firm canvassed for work and were appointed to carry on work in place of the appellants. The appellants sued the respondents for breach of fiduciary duties and after the defence was filed they took out a summons to enter judgment in their favour praying, *inter alia*,

(1) the Respondents be declared that they were trustees for Avel and Elmec in respect of all professional charges received by them and/or their firm Perunding AJZ from November 30, 1983 up to March 1, 1984;

(2) the Respondents be ordered to furnish an account of all sums so received during the aforesaid period; and

(3) for the said breach the Respondents be ordered to pay damages which should be assessed by the Registrar.

The learned trial judge who heard the application ruled that there was a clear breach of the fiduciary duty but he did not give judgment because he held that there were other reasons which entitled the respondents to defend the suit. These reasons were (a) because it was not clear to what extent and to which items of work of the firm the breach occurred; and (b) because the plea by the respondents justifying the breach was relevant to the question of damages. The appellants appealed.

Held: the cause of action in this case is founded on the fact that the respondents as directors of the appellants have committed breach of their fiduciary duties and this was so found by the learned judge. Once he so held there can be no more defence to the appellants' suit and they should therefore be entitled to judgment and the rest of the case should only be a matter of the requisite relief to which the appellants would be entitled consequential upon the finding.

Cases referred to:

(1) *Lynde* v. *Waithman* [1895] 2 Q.B. 180.

(2) *Contract Discount Corporation Ltd.* v. *Furlong & Ors.* [1948] 1 All E.R. 274.

SUPREME COURT.

Sri Ram (*Miss Liza* Chen with him) for the appellant.